Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MERIT CONTRACTING, INC.,
Petitioner,

v.

ROBERTS & SCHAEFER COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its supervisory powers to stop the dangerous trend in the circuits of ignoring the clearly erroneous standard, engaging in impermissible factfinding and basing their decisions upon oral arguments of counsel and other unverified information not of record?

2. Whether this Court should exercise its supervisory authority to resolve the conflict among the circuits as to whether a plaintiff must produce competent evidence to defeat a motion to dismiss for lack of personal jurisdiction?

PARTIES TO THE PROCEEDING

Petitioner is Merit Contracting, Inc., the defendant below.* Respondent is Roberts & Schaefer Company, the plaintiff below.

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* As required by Rule 29.6 of this Court, petitioner states that it has no parent company and that it has no nonwholly owned subsidiaries.

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OPINIONS BELOW

Copies of all official and unofficial reports of opinions and orders delivered in this case are reproduced in the Appendix.

JURISDICTIONAL GROUNDS

The Opinion of the United States Court of Appeals for the Seventh Circuit sought to be reviewed herein was entered on October 30, 1996. Petitioner filed a Petition for Rehearing with the Seventh Circuit on November 13,

1996, which Petition was denied on November 21, 1996. Jurisdiction to review the Opinion of the Seventh Circuit by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254 (1988).

STATEMENT OF THE CASE

Background Facts

Petitioner/Defendant, Merit Contracting, Inc., is a Pennsylvania corporation, with its principal place of business in Monongahela, Pennsylvania. Defendant engages in general construction work and undertakes projects primarily in Pennsylvania, although it has occasionally worked on projects in Ohio, West Virginia and Maryland. Defendant has never engaged in or solicited business in the state of Illinois, nor does it own any real or personal property in that state. (p. 73a).

Respondent/Plaintiff, Roberts & Schaefer Company, is a Delaware corporation and has its principal place of business located in Chicago, Illinois. (pp. 2a, 14a). At all times relevant to this action, Plaintiff maintained an office located in Monroeville, Pennsylvania and dealt with Defendant exclusively through its Pennsylvania office with respect to the project which is the subject of this lawsuit.

In May of 1993, Plaintiff asked Defendant to submit a bid to perform certain construction services at a raw coal storage and handling facility located in Pennsylvania (the "Pennsylvania Facility"). Defendant submitted a bid to Plaintiff to perform concrete and structural steel work, erection, electrical, demolition work and install miscellaneous equipment at the Pennsylvania Facility. Plaintiff accepted Defendant's bid and directed Defendant to proceed with the work. Defendant commenced work in September of 1993. At this point, the contract was formed and the offer and acceptance of the bid constituted the parties' agreement. (p. 17a).

After commencing work at the Pennsylvania Facility, Defendant sent an invoice for services rendered in early September to Plaintiff at its Pennsylvania office. Plaintiff paid the invoice from its Pennsylvania office with a check drawn on a Pennsylvania bank account. Thereafter on or about November 1, 1993, more than half way into the project, Plaintiff first tendered to Defendant a packet of documents that Plaintiff has since claimed to be the contract between the parties. The documents tendered contained a forum selection clause which provided that all disputes between the parties must be resolved in the circuit courts of Illinois. Defendant did not sign the documents because the terms were inconsistent with the parties' agreement. (pp. 17a, 72a-74a).

A dispute arose between the parties concerning the scope of work and certain damages related to delay in the project. Defendant requested payment from Plaintiff for extra work performed and delay expenses, which requests were refused by Plaintiff. After the parties attempted to resolve this matter amicably, Plaintiff filed a declaratory judgment action in the state courts of Illinois against Defendant.

Proceedings Below

Defendant removed the Illinois lawsuit to the United States District Court for the Northern District of Illinois, Eastern Division pursuant to the provisions of 28 U.S.C. § 1441 and 28 U.S.C. § 1332. (p. 82a). Thereafter, Defendant filed a Motion to Dismiss or, in the Alternative, to Transfer or Stay these Proceedings and Plaintiff filed a Motion to Remand the case to the Illinois state court. (pp. 57a, 48a).

In its Motion to Dismiss, Defendant requested that the case be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction over Defendant. In support of its Motion, Defendant filed the

sworn affidavit of its president with accompanying documentation, which affidavit supported the background facts. Plaintiff did not file a counteraffidavit. (p. 17a).

Plaintiff did not contend that Defendant was subject to personal jurisdiction of the Illinois courts under the Illinois Long Arm Statute. Plaintiff predicated its claim for personal jurisdiction solely on the basis of the forum selection clause contained in a document entitled "General Conditions", which Plaintiff had included in the packet of documents that was transmitted to Defendant in November of 1993 and which Defendant never executed.

The District Court heard oral argument on the matter, but did not conduct an evidentiary hearing. The District Court identified the record as consisting of Plaintiff's Complaint and attachments, a Praecipe for Writ of Summons in a Pennsylvania action and the Complaint therein; and Defendant's affidavit with attachments. (p. 18a n.2). The District Court granted Defendant's Motion to Dismiss and dismissed the case for lack of personal jurisdiction pursuant to Rule 12(b)(2). The District Court properly based its decision on the fact that Defendant supported its position that it had never signed the documents or otherwise agreed to the forum selection clause with a sworn affidavit and Plaintiff failed to support its position with any counteraffidavits. (p. 17a).

Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit. (p. 46a). During oral argument, the Seventh Circuit repeatedly questioned counsel on matters not of record concerning the bid documents, scheduling and insurance provisions for the project. (pp. 29a-43a). Thereafter, relying on unverified documents, not considered by the District Court, and assertions of counsel made during oral argument, the Court of Appeals reversed the District Court's decision and remanded the case to the District Court with directions that the *District Court send the case to the Illinois state court.* Defendant filed a timely Petition for Rehearing with the

Court of Appeals, which Petition was denied by Order dated November 21, 1996, (pp. 25a, 26a).

It is apparent from the decision, that the Court of Appeals expanded the record to include unsworn hearsay information and answers from counsel at oral argument to support its decision. For example, the Court of Appeals relied upon a letter, never put into evidence, to prove the truth of the matter asserted.

> "[T]he record includes correspondence between Merit and R&S concerning a change in Merit's construction crews' work schedule. In this correspondence, Merit and R&S negotiated the amount of any delay penalty that might result from the new work schedule." (p. 8a).

In addition to utilizing unsworn information to substantiate its decision, the Court of Appeals repeatedly quotes from answers that were allegedly supplied by appellate counsel at oral argument. Rather than basing its decision upon the evidence submitted to the District Court, the Court of Appeals supports its opinion with phrases such as "[Defendant's] attorney conceded that" and "as described by [Defendant's] attorney." (p. 11a).[1]

The twelve page Opinion of the Court of Appeals reversing the District Court contains no explanation as to why it expanded the record to include statements of counsel and documents other than those properly considered on a Rule 12(b)(2) Motion, as identified by the District Court. There is no explanation by the Court of Appeals as to why or even whether it considered the District Court to have made an erroneous legal conclusion in limiting the record. The Court of Appeals simply

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[1] In its Opinion, the Court of Appeals concludes that "the parties *seem to agree* that Merit performed work *under the contract*", which conclusion is contrary to the only sworn proof of record and is not supported by a shred of evidence. (pp. 7a [emphasis added], 42a, 43a, 74a).

ignored the District Court's factual findings and went on to base its decision on matters which, because they were unverified, should not be considered as having the quality of evidence by any court of law.[2]

In addition to expanding the record without explanation, the Court of Appeals composed a scenario of meetings between the parties and negotiations which was unsupported by a single word of sworn testimony, through affidavits or otherwise. The Court of Appeals even drew inferences from another project despite the complete absence of any record evidence that the project ever existed. (p. 10a).

In essence, the Court of Appeals placed dots on a page then drew lines between the dots to complete a picture, which has no sworn testimony to support either the dots or the lines. To compound its already egregious error, the Court of Appeals then sent the case out of the federal court system, thus deviating from the standard procedure of remanding for further proceedings to the tribunal charged with fact finding in the first instance.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO CORRECT THE DANGEROUS TREND IN THE CIRCUIT COURTS OF ENGAGING IN IMPERMISSIBLE FACTFINDING AND RELYING ON HEARSAY RAISED AT ORAL ARGUMENT TO SUPPORT THEIR DECISION.

This Petition presents the issue of whether an appellate court may engage in continuous factfinding by examining unsworn information and base its reversal of the trial court upon such unsworn information and upon answers provided by appellate counsel to an inquisition at oral

[2] The Court of Appeals never considered whether the "facts" which it found could actually be proven through testimony from witnesses having personal knowledge thereof.

argument. Appellate counsel comes to court prepared to argue the law and the evidence *as developed in the district court*. Neither counsel nor the court are equipped to conduct an evidentiary hearing at the appellate level. Petitioner/Defendant submits that an appellate court should not engage in such conduct because the appellate court then becomes an inquisitioner rather than a neutral arbiter.

Our judicial system is founded upon an adversarial, rather than an inquisitional, model. The federal courts play the role of neutral arbiters of disputes between the parties. The allocation of responsibilities envisions the federal appellate courts looking to the record before them to adjudicate controversies, rather than interrogating the lawyers at oral argument on factual matters outside of the record and basing their findings on the lawyers' responses or upon miscellaneous unsworn information not of record. As Justice Scalia once explained while serving on the United States Court of Appeals for the D.C. Circuit:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983). This principle is not just a rule of convenience, its observance distinguishes our adversarial system from an inquisitional one. See, *United States v. Burke*, 504 U.S. 229, 247, 112 S.Ct. 1867, 1877, 119 L.Ed. 2d 34, 51 (1992) (Scalia J., concurring in judgment).

In this case, the Court of Appeals' interrogation of counsel at oral argument and its reliance upon counsels' responses and on facts from outside the record constitutes an unconscionable departure from its prescribed role as neutral arbiter. (pp. 4a, 8a-11a, 27a-45a). The Court

of Appeals so far departed from the accepted and usual course of judicial proceedings that it conducted its own investigation of the facts and, at best, gave lip service to the "clearly erroneous" standard in its decision. (pp. 11a, 12a). Any court which assumes jurisdiction over a non-resident under the theory that its conduct implied consent to a forum selection clause which was never signed and which is not even referenced in the document he was asked to sign [3] exercises judicial power to the brink of Absolutism; an appellate court which does so in the face of district court findings that a non-resident did not consent to jurisdiction in the far-away forum completely abrogates the judicial restraint envisioned under the clearly erroneous standard of review. As this Court has stated in *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980), "the Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.' " [4] The Court of Appeals so far departed from the accepted and usual course of judicial proceedings in this case that it violated Defendant's due process rights.

The decision of the Court of Appeals in this case is indicative of a dangerous trend in some of the appellate courts to engage in impermissible factfinding and rely on unsworn information rather than competent evidence. As detailed in section III of this Petition, at least four of the circuit courts have assumed the power to expand the record on appeal and have considered information that was never in evidence.[5] If not reversed, this trend poses a serious threat to the integrity of the adversarial process.

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[3] *See* District Court's Opinion, pp. 17a and 18a.

[4] Citing *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945).

[5] *See* discussion *infra* pp. 13-15.

II. THIS CASE AFFORDS THE COURT THE OPPORTUNITY TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS REGARDING THE ISSUE OF WHETHER A PLAINTIFF MUST PRODUCE COMPETENT EVIDENCE TO DEFEAT A MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

The second issue for consideration is whether a plaintiff, when challenged by a motion to dismiss under Federal Rule of Civil Procedure 12(b)(2), must support its allegations of personal jurisdiction over a nonresident defendant with competent proof. The decision of the Court of Appeals in this case is in conflict with the decisions of other United States Courts of Appeals regarding the quantum of proof a plaintiff must produce to establish personal jurisdiction over a nonresident defendant. There is a split among the appellate circuits regarding the correct procedure in resolving jurisdictional fact questions under Rule 12(b)(2). However, no court of appeals has completely relieved a plaintiff from the burden of proving jurisdictional facts at a district court hearing. The Court of Appeal's error, if left uncorrected has significant ramifications with respect to our adversarial system.

In this case, the Court of Appeals has ordered Defendant, a Pennsylvania Corporation which has never had any ties to Illinois, to litigate disputes arising out of a Pennsylvania construction project and a contract negotiated and consummated in Pennsylvania in an Illinois state court. In overruling the trial court, the Court of Appeals relieved the Plaintiff of its burden to substantiate personal jurisdiction with sworn proof. (pp. 4a, 7a-11a). The Court of Appeals rejected the only sworn proof it had—the affidavit of Defendant's president which stated that Defendant had not agreed to litigate disputes in the Illinois state court—and accepted Plaintiff's unsworn allegations to the contrary. However, the United States Court of Appeals for the Seventh Circuit is not alone on this matter.

An alarming trend is emerging in the circuits where the courts of appeals are permitting a plaintiff to defeat a Rule 12(b)(2) motion simply on the basis of facts alleged in a complaint.[6] That is precisely what the Court of Appeals did in this case. The Court of Appeals admitted its confusion regarding the facts, yet chose to uphold jurisdiction without requiring the Plaintiff to produce a shred of evidence. (pp. 4a, 7a-11a).

Justice Holmes wrote for this Court in *McDonald v. Mabee*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608 (1917) that "great caution should be used not to let fiction deny the fair play that can be secured by pretty close adhesion to fact." *Id.*, at 91, 37 S.Ct. at 343-344. In recognizing that personal jurisdiction represents a restriction on judicial power which is a matter of individual liberty, this Court proclaimed that the exercise of jurisdiction must not offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 279 (1940); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2014, 72 L.Ed.2d 492 (1982).[7] When litigants dispute the fundamental facts that give rise to personal jurisdiction, a court should not be permitted to deprive a nonresident defendant of his individual liberty without a meaningful opportunity to be heard.

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[6] *See* discussion *infra*, pp. 15-19.

[7] Aristotle has stated that "The basis of a democratic state is liberty". (*Politics*, Book VI, Ch. 2). Without a meaningful opportunity to be heard in a court of law, the democratic principles underlying our judicial system will surely be compromised.

III. THE COURT OF APPEALS UNDERMINED THE ROLE OF THE TRIAL COURT IN THE JUDICIAL PROCESS.

The actions taken by the appellate court undermined the role of the trial court judge in the judicial process. It is the trial judge, rather than the appellate court, that resolves conflicts in the evidence and weighs and evaluates the same.[8] Instead of following this division of judicial function, the Court of Appeals evaluated the only evidence before it—Defendant's affidavit—then rejected the same as incredible and self-serving. (p. 10a). An appellate court is in no position to determine the credibility of witnesses because that role is left for the trial court.[9] Further, the Court of Appeals' reliance upon appellate counsels' responses to an interrogation at oral argument is equally improper. It is ironic that the United States Court of Appeals for the Seventh Circuit has, in the past, criticized the use of appellate counsel's testimony to establish facts outside the record. In *Matter of Kilgus*, 811 F.2d 1112 (7th Cir. 1987), the United States Court of Appeals for the Seventh Circuit stated that " 'testimony' by appellate counsel is no substitute for evidence in the record". 811 F.2d at 1118 n.2. Unfortunately, the Court of Appeals decided to depart from the standard it had correctly articulated when deciding this case.

The standard governing appellate review of a district court's findings of fact is set forth in Fed. R. Civ. P. 52(a). That rule provides, in relevant part, that "findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial

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[8] *Trytko v. Hubbell, Inc.*, 28 F.2d 715 (7th Cir. 1994), (trial court has exclusive function of assessing credibility, determining weight to be given to evidence, drawing inferences from facts established of record and resolving conflicts in evidence); *State Distributors, Inc. v. Glenmore Distilleries Company*, 738 F.2d 405 (10th Cir. 1984) (same).

[9] *Strauch v. Gates Rubber Co.*, 878 F.2d 1282 (5th Cir. 1989).

court to judge the credibility of witnesses." This Court has cautioned the appellate courts to avoid overstepping the bounds of their duty under Rule 52(a) by duplicating the role of the trial court.[10] Specifically, this Court has instructed the appellate courts to avoid deciding factual issues *de novo* when applying the clearly erroneous standards to the findings of a district court sitting without a jury.[11] Further, this Court has expressly stated that the Federal Rules of Civil Procedure do "not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." [12] Where there are two permissible views of the evidence in light of the record, the appellate court may not find that the decision of the district court is clearly erroneous.[13] This is true even when the district court's findings do not rest on credibility determinations, but are based on documentary evidence or inferences from other facts.[14]

The District Court's account of the evidence was clearly plausible in light of the uncontroverted affidavit of record. The record viewed in its entirety establishes that the Court of Appeals failed to apply the "clearly erroneous" standard. Instead, the Court of Appeals filled factual gaps with unverified allegations rather than remanding the case back to the District Court, the original factfinder, for an evidentiary hearing. (pp. 8a, 11a, 27a-45a). As this Court

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[10] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

[11] *Id.* 395 U.S. at 123, 895 S.Ct. at 1576.

[12] *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982).

[13] *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); See also, *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d (1982).

[14] *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 513 (1985).

stated in *Anderson v. Bessemer City, North Carolina*, 470 U.S. 564, 574-575, 105 S.Ct. 1504, 1512, 48 L.Ed.2d 518 (1985):

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling the role comes expertise. Duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

In the present case, the Court of Appeals made but a single reference to the District Court's decision in recounting the history of the case. (p. 6a). The District Court had correctly determined that there was no basis for holding a non-resident defendant to a forum selection clause he had never signed, particularly where the document containing the clause was not even referenced in the document he was asked to sign; yet the appellate panel cast facts found by the District Court aside without even analyzing the District Court's Opinion. There was no discussion in the Court of Appeal's Opinion of the reasoning utilized by the District Court and no explanation offered why that reasoning was clearly erroneous. (pp. 1a-13a). Instead, the Court of Appeals ignored the dictates of Rule 52(a) and engaged in repeated factfinding, considering unverified information that was outside the record. (pp. 4a, 8a-11a, 27a-45a). This practice of impermissible appellate factfinding has been condemned by this Court.[15]

The United States Court of Appeals for the Seventh Circuit is not alone in this practice of impermissible fact-

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[15] *Amadeo v. Zant*, 486 U.S. 214, 228, 108 S.Ct. 1771, 1780, 100 L.Ed.2d 249 (1988), citing *Icicle Seafoods, Inc v. Worthington*, 475 U.S. 709, 712-715, 106 S.Ct. 1527, 1529-1530, 89 L.Ed.2d 739 (1986).

finding. Other appellate courts have assumed the power to expand the record on appeal and thus base their review of the district court's findings on evidence which was not before the district court. In *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982), the Eleventh Circuit justified the expansion of the record on the appellate court's inherent equitable powers and gleaned support from this Court's approval of appellate rulings on issues not decided below in certain limited situations.[16] Several courts of appeals have read Rule 10(e) of the Federal Rules of Appellate Procedure as authorizing them to expand the record on appeal.[17] Other courts have found authority from the "interests of justice."[18] When appellate courts expand upon the record without discussion, as in the instant case, it is often difficult to discern the court's rationale; indeed, in most cases, none but the district court and counsel directly involved in the appeal

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[16] *Dickerson v. Alabama*, 667 F.2d at 1367, where the Court of Appeals relies on *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976).

[17] *Ross v. Kemp*, 785 F.2d 1467, 1472 (11th Cir. 1986); *Castle v. Cohen*, 840 F.2d 173, 180, f.n. 12 (3rd Cir. 1988); *United States v. Aulet*, 618 F.2d 182, 185-187 (2nd Cir. 1980) (The *Aulet* case illustrates the disruption of normal appellate procedure which can occur when an appellate court improvidently permits an appellant to raise an issue not raised below. Having permitted a criminal defendant to first raise the issue of ineffective assistance of counsel on appeal instead of following the normal procedures under 28 U.S.C. § 2555, the appellate court felt constrained to approve the government's expansion of the record on appeal to demonstrate reasonable grounds for counsel's trial strategy).

[18] *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61 (8th Cir. 1993) (The *Dakota* court admitted the evidence on appeal because the court believed that the evidence conclusively demonstrated that the appellees had made material misrepresentations to the district court. However, the Court of Appeals exercised judicial restraint by remanding the case to the district court for reconsideration rather than reversing); See also, *Turk v. United States*, 429 F.2d 1327, 1329 (8th Cir. 1970).

are even aware that the record has been expanded on appeal.

The decision of the Court of Appeals in this case is indicative of the dangerous trend in some of the appellate courts to engage in impermissible factfinding and rely on unsworn information rather than competent evidence.[19] If not reversed this trend may jeopardize the fundamental fairness that flows from our adversarial system.

IV. THE COURT OF APPEALS RELIEVED THE PLAINTIFF OF ITS BURDEN TO ESTABLISH PERSONAL JURISDICTION OVER DEFENDANT.

This Court has never explicitly ruled upon the issue of whether sworn proof is required to sustain personal jurisdiction over a defendant who challenges such jurisdiction pursuant to a Rule 12(b)(2) motion. This Court has long compelled plaintiffs to establish subject matter jurisdiction through sworn proof, by affidavit or otherwise. *KVOS, Inc. v. Associated Press*, 299 U.S. 169, 57 S.Ct. 197, 81 L.Ed. 183 (1936); *McNutt v. GMAC*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936). Most of the circuit court decisions on personal jurisdiction have imposed a similar requirement—the plaintiff must ultimately prove the facts supporting personal jurisdiction by a preponderance of the evidence when challenged by the defendant.[20] However, all of the circuits will deny a Rule

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[19] *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir. 1982); *Castle v. Cohen*, 840 F.2d 173 (3rd Cir. 1988); *United States v. Aulet*, 618 F.2d 182 (2nd Cir. 1980); *Dakota Industriies, Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61 (8th Cir. 1993).

[20] *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992); *Ball v. Metallurgie Hoboken—Overpelt, S.A.*, 902 F.2d 194 (2nd Cir. 1990); *Carteret Savings Bank, F.A. v. Shushan*, 954 F.2d 141 (3rd Cir. 1992); *Combs v. Bakker*, 886 F.2d 673 (4th Cir. 1989); *Felch v. Transportes Lar-Mex SA*, 92 F.3d 320 (5th Cir. 1996); *Theunissen v. Mathews*, 935 F.2d 1454 (6th Cir. 1991); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971); *Radaszewski v. Telecom Corp.*, 981 F.2d 305 (8th Cir. 1992);

12(b)(2) motion before trial or an evidentiary hearing if the plaintiff can establish a *prima facie* showing of the existence of jurisdiction.[21] The prevalent practice in essentially all of the circuits is to initially rule on the motion to dismiss without an evidentiary hearing, applying the *prima facie* standard. Where the circuits differ is in the procedures they employ when applying the *prima facie* standard. The divergence has resulted in some circuits allowing a plaintiff to initially withstand a Rule 12(b)(2) motion without offering any competent proof.[22] Other circuits require a plaintiff to establish jurisdiction with competent proof.

The danger of permitting a plaintiff to rest on its pleadings when confronted with a motion to dismiss for lack of personal jurisdiction is vividly illustrated here. Defendant is now compelled to defend a lawsuit in a jurisdiction with which it lacks "minimum contracts" and, as Defendant has established through uncontradicted competent proof, where Defendant never agreed to litigate.

Although it seems that due process concerns would dictate that the same burden of supporting jurisdiction through sworn proof imposed by this Court in cases involving subject matter jurisdiction should be enforced in cases involving personal jurisdiction, the Seventh Circuit clearly departed from that requirement. The Seventh Circuit's decision that a party can be compelled to defend itself in a distant forum unrelated to the controversy on the strength of unsworn allegations of his opponent is an

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Omeluk v. Langsten Slip & Bathyggeri A/S, 52 F.3d 267 (9th Cir. 1995); *Williams v. Bowman Livestock Equipment Co.*, 927 F.2d 1128 (10th Cir. 1991); *Chalwest Limited v. Ellis*, 924 F.2d 1011 (11th Cir. 1991).

[21] *See* cases cited *supra* note 20.

[22] *Combs v. Bakker*, 886 F.2d 673 (4th Cir. 1989); *Felch v. Transportes Lar-Mex*, 92 F.3d 320 (5th Cir. 1996); *Turnock v. Cope*, 816 F.2d 332 (7th Cir. 1987); *Wenz v. Memery Crystal*, 55 F.3d 1503 (10th Cir. 1995).

offense to the traditional notions of fair play and substantial justice.

Although the Court of Appeal's reliance on unsworn allegations is clearly improper, decisions of this nature are not uncommon in the Seventh Circuit. The United States Court of Appeals for the Seventh Circuit has repeatedly stated that, when faced with a Federal Rule of Civil Procedure 12(b)(2) motion, the allegations in the plaintiff's complaint are to be taken as true unless controverted by the defendant's affidavits, and any conflicts in the affidavits are to be resolved in the plaintiff's favor.[23]

There is an emerging rule in some of the other circuits to suggest that the Seventh Circuit is not the only forum where a plaintiff bears no burden to establish personal jurisdiction with competent proof. The United States Court of Appeals for the Fourth Circuit relieves a plaintiff of the burden of producing any evidence to defeat a well-pleaded motion to dismiss for lack of personal jurisdiction.[24] Similarly, all facts as alleged by the plaintiff are taken as true and considered as evidence by the Fifth Circuit in adjudicating motions to dismiss under Fed. R. Civ. P. 12(b)2.[25] This departure from traditional evidentiary standards is also found in the Tenth Circuit where

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[23] *Turnock v. Cope*, 816 F.2d 332 (7th Cir. 1987); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971).

[24] *Combs v. Bakker*, 886 F.2d 673 (4th Cir. 1989) (motion papers, legal memoranda and the allegations in the plaintiff's complaint are considered to justify reversal of the district court's order granting defendant's motion to dismiss); See also, *Dowless v. Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305, 1307 (4th Cir. 1986) ("[Plaintiff] need not present evidence in making a prima facie case to oppose a motion to dismiss. Mere allegations are sufficient . . .".).

[25] *Felch v. Transportes Lar-Mex.*, 92 F.3d 320 (5th Cir. 1996); *Wilson v. Belin*, 20 F.3d 644 (5th Cir. 1994); *Ruston Gas Turbines Inc. v. Donaldson Company, Inc.*, 9 F.3d 415 (5th Cir. 1993); *Bullion v. Gillespie*, 895 F.2d 213 (5th Cir. 1990).

the allegations in the plaintiff's complaint are presumably true and may be considered to defeat a motion to dismiss.[26]

In stark contrast to the method utilized in the Fourth, Fifth, Seventh and Tenth Circuits, there are several Circuits that have correctly insisted that the plaintiff produce evidence to defeat a well-pleaded motion to dismiss. In the United States Court of Appeals for the First,[27] Third,[28] and Eleventh [29] Circuits, for example, a motion to dismiss must be sustained in the absence of competent evidence to the contrary. This is a reasonable approach that promotes fairness in the judicial process and is consistent with the standards enunciated by this Court on issues of subject matter jurisdiction. This is the rule that Petitioner respectfully suggests this Court adopt, and the application of such a rule here means that the Court of Appeals below should be reversed.

The developing trend of impermissible appellate fact-finding, the consideration of unverified information d'hors the record and the confusion in the circuits regarding the quantum of evidence a plaintiff must produce to defeat a motion to dismiss for lack of personal jurisdiction, pose a serious threat to the traditional notions of fair play and substantial justice. Without guidance from this Court, the circuit courts are free to continue to consider matters outside the record and to relieve a plaintiff of his burden of proof in matters of personal jurisdiction. Accordingly, this Court should fulfill its supervisory responsibilities over the federal courts, resolve the circuit conflicts regarding the quantum of evidence a plaintiff must produce to de-

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[26] *Wenz v. Memery Crystal*, 55 F.3d 1503 (10th Cir. 1995) (The allegations in the plaintiff's complaint must be accepted as true in ruling on a motion to dismiss).

[27] *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671 (1st Cir. 1992).

[28] *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61 (3rd Cir. 1984).

[29] *Chalwest Limited v. Ellis*, 924 F.2d 1011 (11th Cir. 1991).

feat a motion to dismiss and instruct the courts of appeals that they should limit their consideration to evidence of record in determining matters of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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